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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 90-336

RESPONSE REQUESTED

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

W.R. BARKER, Superintendent
Columbus County Prison Unit,
Brunswick, North Carolina and
LACY H. THORNBURG, Attorney General
of the State of North Carolina,

Petitioners,

v.

WILTON HOWELL,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES respondent, Wilton Howell, and moves this Court for leave to proceed in forma pauperis pursuant to Rule 39. Respondent sought and obtained leave to so proceed in the United States Court of Appeals for the Fourth Circuit and was appointed counsel under the Criminal Justice Act of 1964 on 4 May 1988. See 18 U.S.C. sec. 3006A(d)(6).

WHEREFORE, respondent respectfully requests that he be allowed to proceed without prepayment of fees.

This the 12th day of November, 1990.

Respectfully submitted,

William Golden Simpson, Jr.

William Golden Simpson, Jr.
North Carolina Civil Liberties
Union Legal Foundation
P.O. Box 28004
Raleigh, NC 27611
(919) 834-7026

No. 90-336

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Respondent.

****

CERTIFICATE OF SERVICE

****

I, William Golden Simpson, Jr. a member of the bar of the Supreme Court of North Carolina and an applicant for membership in the bar of this Court, hereby certify that on the 12th day of November 1990, one copy of the Respondent's Brief in Opposition and Respondent's Request to Proceed *in forma pauperis* in the above entitled case were served upon Mr. Barry S. McNeill, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, counsel for the Respondent therein, by first-class mail, postage prepaid. I further certify that all parties required to be served have been served.

This the 12th day of November, 1990.

Respectfully submitted,

William Golden Simpson, Jr.
North Carolina Civil Liberties Union Legal
Foundation
Post Office Box 28004

Raleigh, North Carolina 27611
(919) 834-7026

Subscribed and sworn to before me this the 12th day of November, 1990.

Pamela G. Duesenberry
Notary Public
My Commission Expires: 11-14-93

North Carolina Civil Liberties Union Legal Foundation
P.O. Box 28004 / Raleigh, North Carolina 27611-8004 / (919) 834-3390

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November 12, 1990

Mr. Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Washington, DC 20543

Re: Barker, et al. v. Howell, No. 90-336

Dear Mr. Spaniol:

Enclosed for filing please find a brief in opposition to certiorari, a motion for leave to proceed in forma pauperis, and an affidavit of service. I am also enclosing a motion for admission to the Bar of the Supreme Court, an application for same, a certificate of good standing, and a check for $100. If you have any questions or concerns, please get in touch.

Thank you.

Sincerely,

William Simpson
Legal Director
(919) 834-7026

cc: Barry McNeil

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Petitioners,

v.

WILTON HOWELL,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

William Golden Simpson, Jr.
North Carolina Civil Liberties Union Legal Foundation
Post Office Box 28004
Raleigh, North Carolina 27611
(919) 834-7026

QUESTIONS PRESENTED

I. WHETHER THE INTENTIONAL AND UNJUSTIFIABLE DELAY OF TWENTY-SEVEN MONTHS IN SERVING AN ARREST WARRANT ON RESPONDENT, WHO WAS A PRETRIAL DETAINEE IN AN ADJOINING COUNTY, SUBSTANTIALLY PREJUDICED HIM IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW?

II. WHETHER THE FOURTH CIRCUIT'S APPLICATION OF MARION AND LAVOSCO CONSTITUTES A NEW RULE REQUIRING CONSIDERATION OF RETROACTIVITY?

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LACY H. THORNBURG, Attorney General
of the State of North Carolina,

Petitioners,

v.

WILTON HOWELL,

Respondent.

**BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Respondent, Wilton Howell, respectfully opposes and requests this Court to deny the Petition for Writ of Certiorari filed by petitioners seeking review of the decision by the United States Court of Appeals for the Fourth Circuit. *See Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990).

OPINION BELOW

JURISDICTION

CONSTITUTIONAL PROVISIONS

Pursuant to Rules 15.2 and 24.2, these items are omitted since respondent is satisfied with petitioners' statements of the OPINION BELOW, JURISDICTION, AND CONSTITUTIONAL PROVISIONS.

STATEMENT OF THE CASE

Respondent is satisfied with petitioners' Statement of the Case with the addition of several pertinent facts. These are set out here.

At the May 1982 hearing on the pretrial motion to dismiss, Bladen County Detective Phillip Little testified that, after respondent's release from the Robeson County Jail in early 1980, he was incarcerated in the North Carolina Department of Corrections. Prior to that time, Detective Little had only a "hold" on respondent in Robeson County accomplished by requesting Robeson authorities to notify Little when they had completed proceedings involving him. Respondent testified he had informed Detective Little about his working at Ray's Body Shop on the day of the robbery. Respondent was unable to locate George Ray Hunt, the man for whom he was working on the afternoon of the robbery. He had talked to Hunt's sister, however, who said he was in Florida. Hunt had not given his Florida address to her.

At the request of respondent's trial counsel, Stacey Howell, respondent's brother, tried to locate Hunt. Knowing Hunt no longer worked at Ray's Body Shop, he checked with Charlie Matamoros. Matamoros, who lived in Lumberton, was Hunt's brother-in-

law and the only person Stacey Howell believed would know Hunt's whereabouts. Matamoros could only inform Stacey Howell that Hunt was in Florida. He not only had no address for Hunt, but also did not know in what city or county he was living. As respondent's trial counsel explained, every avenue he or Stacey Howell knew to locate Hunt were vainly exhausted.

The only person who apparently had Hunt's Florida location was his mother. Respondent and Stacey Howell, however, did not know Hunt's mother. Likewise, they apparently had no knowledge of Hunt's sister unless she was Matamoros' wife. In that case, she apparently did not know Hunt's address either.

Ruby Carlyle, who was sixty-six years old, gave the identification testimony against respondent. She acknowledged that when she went to view the lineup in the Robeson County Jail, she assumed the robbers would be in the lineup. Furthermore, she noted the weakness of her own identification because ever since the robbery her mind had been confused: "Whatever I say, you can't depend on it. Sometimes it's right and sometimes it ain't." Asked about her testimony at a preliminary hearing, she said: "I told you I couldn't remember nothing. My mind is ruined."

Describing her identification at the lineup, Carlyle said she assumed the robber was in the lineup. On redirect examination, she said she picked respondent from the lineup and elaborated on why she could not identify the other robber as follows:

> But if I could have had them to come to me, instead of me going to them, I could have identified both of them. But that' what -- I've got a brother that has fits whenever somebody looks in his face, and I'm near about like him; and I've got one that will pass out.

Detective Little also explained the written note he had of Carlyle's description of the robbers, which was only a "black male with a wig." Carlyle told him she "wasn't sure"

how tall the robbers were, said one had "some face hair," and did not say how much the robbers weighed. Little recalled Carlyle identified Bobby Howell at the preliminary hearing as the robber.

Respondent's brother, Stacey Howell, was at the jail lineup. He heard respondent's former attorney ask Detective Little whether Carlyle was sure in identifying Howell. He heard her say, "No, that she won't sure, but she thought that he could be the one." Stacey also said his other brother, Russell, who owned the black car at the house, had been driving it the day respondent was arrested. Russell Howell always parked the car at the house, because he drove a truck for Stacey Howell and picked the truck up at the house. Respondent never owned the black car identified as the one at the robbery. Stacey had never seen respondent drive Russell Howell's car. So far as he knew, only Russell Howell and Russell Howell's wife drove that car.

Respondent's brother, Bobby Howell, recalled that at the preliminary hearing, Carlyle at first identified respondent but then changed and said he, Bobby, was the person who robbed her. Respondent recalled that Carlyle testified at the preliminary hearing she picked him from the jail lineup because he "was the most look-alike one." She said she picked him because he "looked like the one, but she wasn't sure."

Respondent testified he told Detective Little he had worked in the morning for the City and then went to work at Ray's Body Shop the first time Little questioned him. He told Little he had not been to Elizabethtown and knew nothing about a robbery. During a second interrogation, Detective Little told respondent his fingerprints had been obtained from the scene of the robbery. Respondent told him to bring them to the jail, if he did, and match them to his. Little did not come back.

The check George Ray Hunt paid respondent for the week that included the day of the robbery was introduced at the post-conviction hearing. Although Hunt left his Florida address with his mother, Stacey Howell did not know his mother. Hunt had a sister living in Lumberton in 1982, but he did not tell her his Florida address. Hunt recalled the specific Wednesday of the robbery, because on that day respondent came in early when the City truck broke down. The Wednesday of the robbery was the only day respondent ever worked a full day for Hunt, so it was the biggest pay check for a week he ever got. Hunt had not had any contact at all with respondent Wilton since his return to North Carolina; he had contact with Stacey Howell about six months before the hearing.

In answers to various interrogatories allowed as discovery during the habeas corpus proceedings, Detective Little recalled that Robeson County Detective Tom Epsey asked him not to serve the warrant on respondent. He did not recall the reason. Epsey said that he could have requested a delay, but such a delay would only have been for a brief time and not past respondent's first appearance in Robeson District Court. The Bladen County Sheriff's Department did not contact the Robeson County District Attorneys Office about the charge against respondent and the Bladen County District Attorneys Office had no contact with Robeson County authorities about him at any time between 1 November 1979 and 4 February 1982. Robeson County deputies said that the policy in Robeson County was to withhold service of warrants for individuals incarcerated in another county until the other county had finished, unless the Robeson County charges were more serious than the other county's charges. Bladen County had no such policy, according to its district attorney. The Bladen County district attorney knew the statutory procedure for detainers as well as the informal request to detain.

REASONS WHY A WRIT SHOULD NOT ISSUE

Petitioners' assert two justifications for this Court to issue a Writ of Certiorari to review the Fourth Circuit's decision. First, they argue the decision reflects the minority position among the circuits on the question of what facts will establish impermissible preindictment delay. Second, they desire a remand so the lower court can consider retroactivity, an issue raised for the first time in the petition to this Court. Neither claim merits this Court's review.

Initially, all the lower courts reviewing respondent's constitutional claim (including the federal magistrate, the chief district court judge, and the panel majority) applied, in straightforward fashion, the principles articulated by this Court in *United States v. Marion*, 404 U.S. 307 (1971) and *United States v. Lovasco*, 431 U.S. 783 (1977). Each, in turn, examined the uncontroverted evidence in the record from various state court proceedings and the government's answers to the interrogatories allowed under the discovery provisions of the habeas corpus rules. This record evidence showed substantial prejudice to respondent from the loss of the key alibi witness whose testimony would have been corroborated by documentary evidence. Furthermore, this record evidence showed an intentional, conscientious decision to delay service of the arrest warrant for twenty-seven months for no legitimate reason. This delay of more than two years *after* the warrant had been issued and the investigation completed was done solely for the convenience of jail personnel to avoid moving respondent between two jails in adjacent counties during pretrial proceedings.

Additionally, the circuits are not as divided on this issue as it might seem at first blush. When the facts of the cases are examined, most circuits, like the Fourth Circuit, require some evidence of inexcusable delay. On the facts *sub judice*, the Fourth

Circuit's decision is not out of step with the way the majority of federal courts read *Marion* and *Lovasco*.

Finally, a remand for consideration of retroactivity is wholly unnecessary. The Fourth Circuit did not announce a new rule in this case under *Teague v. Lane*, 489 U.S. 288 (1989). Rather it applied the analysis required by *Marion* and *Lovasco* as previously interpreted by the Fourth Circuit. *E.g., United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399 (4th Dir. 1985). Retroactivity questions do not even arise in this case.

I. THE INTENTIONAL AND UNJUSTIFIABLE DELAY OF TWENTY-SEVEN MONTHS IN SERVING AN ARREST WARRANT ON RESPONDENT, WHO WAS A PRETRIAL DETAINEE IN AN ADJOINING COUNTY, SUBSTANTIALLY PREJUDICED HIM IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

Respondent established an intentional, conscientious decision by the government to delay twenty-seven months in serving him with the arrest warrant. This delay had no legitimate basis, but merely avoided inconvenience to jail personnel. It worked to advantage the government by causing respondent to lose a key alibi witness. Under this Court's teachings, this violated due process of law under the Fifth and Fourteenth Amendments. Accordingly, a Writ of Certiorari should not be granted.

A. The Fourth Circuit Followed This Court's Due Process Jurisprudence.

Contrary to petitioners claim, the Fourth Circuit's decision followed the principles articulated by this Court regarding pre-arrest or preindictment delay by the

prosecution. It conducted a sensitive, case-by-case inquiry in which it balanced the rights of the accused and the interests of the sound administration of justice. That is precisely the analysis this Court prescribed for this situation. *E.g., United States v. Lovasco*, 431 U.S. 783, 797 (1977); *United States v. Marion*, 404 U.S. 307, 325 (1971). Although this Court found, on the peculiar facts of both cases, no due process infringement by the preindictment delay, it recognized that intentional delay could have due process implications. While more than mere prejudice to a defendant must be shown, the Court saw no need to engage in hypothetical line drawing. Rather, "[t]o accommodate the sound administration of justice to the rights of defendant to a fair trial will necessarily involve *a delicate judgment based on the circumstances of each case.* *Marion*, 404 U.S. at 324-25 (emphasis added); *United States v. Lovasco*, 431 U.S. 783, 797 (1977) (lower courts are to apply the "settled principles of due process . . . to the particular circumstances of individual cases"). While proof of prejudice is "generally a necessary but not sufficient element of a due process claim," a "due process inquiry must consider the reason for the delay as well as the prejudice to the accused." *Lovasco*, 431 U.S. at 790. The Fourth Circuit applied these "settled principles of due process" in this case by weighing the reasons for the delay against the prejudice to respondent.

Marion and *Lovasco* define the broad range of possible claims of unconstitutional preindictment delay. *Lovasco* teaches that delay caused by legitimate investigation does not violate due process, even if the defense suffers prejudice from the lapse of time. 431 U.S. at 796. (noting that constitutional commands on when investigations must end and trials begin serves neither the interests of the accused or the administration of justice). Conversely, *Lovasco* and *Marion* acknowledge that intentional prosecutorial delay to gain a tactical advantage or to harass the accused, resulting in substantial prejudice, violates due process. *Lovasco*, 431 U.S. at 796 n.16, *Marion*, 404 U.S. at 234. Yet, as *Lovasco* also notes, a middle ground exists in which

"[a] due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting . . . an appreciable risk of" prejudice. 431 U.S. at 795 n.17.

In the abstract, then, it is impossible to determine the circumstances in which preindictment delay contravenes due process. The rule to be applied from this Court's decisions is simply a case-by-case analysis of the reasons for the delay and its prejudice to a particular defendant. This Court, therefore, left "to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases." *Id.* at 797. By delicately and carefully balancing respondent's right to a fair trial and the government's interests in the sound administration of justice, the Fourth Circuit adhered faithfully to these "settled principles of due process" elucidated by this Court.

Petitioners' suggestion that this Court has somehow retreated from this fact-specific approach is misplaced. (Pet. 9-10) Justice [now Chief Justice] Rehnquist correctly observed a defendant successfully shows unconstitutional preindictment delay where the facts demonstrate the prosecution deliberately delayed bringing an indictment as a device to gain an advantage over him and that this delay prejudiced him. *United States v. Gouveia*, 467 U.S. 180, 192 (1984). The *dictum* statement[1] did not establish a constitutional minimum but merely restated "the established outer contours of unconstitutional preindictment delay." (App. 12) Due process is necessarily violated by a deliberate and prejudicial delay to gain a tactical advantage. But intentional delay for tactical objectives is not a prerequisite to establishing a due process violation.[2]

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[1] The issue in *Gouveia* involved an inmate's Sixth Amendment right to counsel while in administrative detention pending indictment for a crime committed in prison. *United States v. Gouveia*, 467 U.S. 180, 182 (1984).

[2] Petitioners' reference to Marshall's statement in his dissenting opinion in *United States v. MacDonald*, 456 U.S. 1, 20 (1982), is taken out of context. Justice Marshall argued there for a broader

Petitioners mischaracterize the Fourth Circuit's application of *Marion* and *Lovasco* by quoting only part of its opinion. (Pet. 12) In so doing, they wrongly suggest the lower court required no evidence of improper prosecutorial delay when it said a defendant, need not "prove improper prosecutorial motive. . . ." (Pet. 12) In full context, the Fourth Circuit said:

> Applying these principles of due process to the case at hand, we cannot agree with the position taken by the State of North Carolina and those other circuits which have held that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive before securing a due process violation. Taking this position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face, would violate fundamental conceptions of justice, as well as the community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecutorial motive.
>
> The better position, and the one previously taken by this Circuit in *United States v. Automated Medical Laboratories, supra*, is to put the burden on the defendant to prove actual prejudice. Assuming the defendant can establish actual prejudice, then the court must balance the defendant's prejudice against the government's justification for delay. *Automated Laboratories*, 770 F.2d at 403-04. "The basic inquiry then becomes whether the government's action in prosecuting after substantial delay violates 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.' " *Id.* at 404 (citations omitted).

The Fourth Circuit did not hold, contrary to petitioners' insinuation, that the reasons for the delay are irrelevant. Rather, it simply declined to impose on a defendant the burden of proving an improper prosecutorial motive so long as the reasons for the delay are shown or apparent. (Pet. App. 14-15)

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scope for Sixth Amendment prosecutions because of the limited protection available under due process. It hardly supports any notion that the balancing approach espoused in *Marion* and *Lovasco* and applied by the Fourth Circuit here is no longer appropriate or sound.

Here, the prosecution's investigation was complete and a formal accusation had been sworn out. Nothing significant remained to be developed for the government. Delay could only impair respondent's effort to mount an effective defense. The delay resulted unequivocally in his loss of his most significant alibi witness -- George Ray Hunt. The prejudice was clear.[3]

Second, the prosecution well knew respondent was imprisoned in the next county for approximately five months after issuance of the warrant. Detective Little obtained an arrest warrant in Bladen County for respondent on the robbery charge the day after interrogating him in the jail of an adjacent county where he was incarcerated on other charges. Axiomatically, incarceration hampers the accused's ability to prepare his defense by depriving him of the "ability to confer with potential defense witnesses, or even to keep track of their whereabouts." *Smith v. Hooey*, 393 U.S. 374 (1969). The risk that delay in informing respondent of the criminal charge would impair his ability to defend himself was self-evident.

Little's decision not to notify respondent of the charge was "intentional" and amounted to reckless disregard of the constitutionally mandated procedural protections designed to permit respondent to meet the power of his adversary on at least minimally fair terms. A prisoner in a jail pursuant to a criminal proceeding who has other criminal charges pending elsewhere in the State may compel his trial within six months. N.C. Gen. Stat. § 15A-10.2(a) (1983). The absence of notice of the charge deprived respondent of the opportunity to exercise either of these rights.[4] The delay reflected a

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[3] In the proceedings below, the government conceded the delay prejudiced respondent. (Pet. App. 11-12) It takes no different position in its petition to this Court.

[4] Additionally, the delay prevented defendant from the potential benefit of concurrent imposition and service of sentences from the Robeson and Bladen convictions. He actually completed the Robeson sentence before the Bladen warrant was served on him. (Pet. 4) The district court recognized this prejudice (Pet. App.), which the North Carolina Supreme Court had found unacceptable and prejudicial. *See State v. Johnson*, 275 N.C. 264, 275, 167 S.E.2d 274, 282 (1969).

desire to avoid an inconvenience in transporting a prisoner from one county to another for concurrent judicial proceedings. The sole reason for the delay was Bladen County's desire to accommodate the Robeson County Sheriff's Department's desire not to have to "transport jail inmates to other counties on court business until the Robeson County proceedings had been completed." The government admitted it was merely for convenience and described the actions as "negligent." (Pet. App. 15) Yet the intentional choice to delay *informing* the accused of the pendency of the criminal accusation is far more than negligence. It amounted to "prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution" that showed an appreciable risk of prejudice to respondent. *Lovasco*, 431 U.S. at 795 n. 17. The district court characterized the government's reason as a "*conscious decision*" to override respondent's constitutional rights for the sake of conveniencing the Robeson County authorities, a "lack of diligence" with "no satisfactory excuse" (App. 113), "willful[] neglect[]" and "completely unnecessary and unjustifiable delay." (Pet. App. 112, 113) (emphasis in original). It amply satisfies the "deliberate disregard" language of *Lovasco*.

The Fourth Circuit plainly followed *Marion* and *Lovasco*. This Court's review is wholly unnecessary.

B. The Facts In This Case Establish A Constitutional Violation In Most Circuits.

Petitioners rely heavily on a purported split of authority among the circuits regarding what the record must reveal for preindictment delay to violate due process. *See Hoo v. United States*, 484 U.S. 1035 (1988) (White, J., dissenting from the denial of certiorari). Petitioners claim the majority rule requires "a showing a prosecutor's misconduct designed to obtain a tactical advantage over the defendant or to advance

some other impermissible purpose." (Pet. 12) The minority rule, according to petitioners, says "a defendant need not prove an improper prosecutorial motive." (Pet. 13) The facts of this case reveal that this purported split of authority is more illusion than reality.

The record here plainly reveals an intentional decision by the government to withhold service of the Bladen County arrest warrant, despite full knowledge of respondent's pretrial detention in adjacent Robeson County. The delay lasted twenty-seven months, during which time respondent was tried, convicted, and served his entire sentence on the Robeson charge. The Bladen County authorities knew respondent was incarcerated in Robeson County and, in fact, Detective Little interrogated him and had him participate in a pretrial lineup while he was incarcerated in Robeson County. As the government admitted, both in testimony in various proceedings in state court and in answers to interrogatories during habeas corpus discovery, that the delay was a conscious decision merely to convenience prison and law enforcement officials. Furthermore, Bladen County authorities made only an informal agreement with Robeson County authorities to be kept informed of respondent's status. They deliberately and consciously failed to file a formal detainer that denied respondent an opportunity to demand an expedited trial, *see* N.C. Gen. Stat. § 15.10-2. The undisputed record plainly shows an illegitimate and wholly unjustifiable delay.

These facts do not present an appropriate case for this Court to consider the purported split of authority even assuming one exists. The cases upon which petitioners rely to establish this division of authority support the Fourth Circuit's decision here. In many of these cases, the government delayed indicting a defendant because it was in the midst of a complex investigation that necessitated the delay. *See, e.g., United States v. Ismaili*, 828 F.2d 153, 166-67 (3rd Cir. 1987) (delay due to government possessing

insufficient evidence of defendant's guilt, coupled with an absence of prejudice), *cert. denied*, 485 U.S. 935 (1988); *Hoo*, 825 F.2d at 671 (complex investigation in which crucial evidence by a newly cooperating witness became available at the last moment); *United States v. Labron-Gonzalez*, 816 F.2d 823, 831 (1st Cir.) (cooperating witness did not become available until his arrest four years after defendant's crime; indictment returned six months after cooperation began), *cert. denied*, 484 U.S. 843 (1987); *United States v. Atisha*, 804 F.2d 920, 928-29 (6th Cir. 1986) (investigatory reasons for delay based upon the new cooperation of a co-conspirator facilitating more detailed investigation of defendant's conspiracy), *cert. denied*, 479 U.S. 1067 (1987); *United States v. Bliss*, 735 F.2d 294, 300 (8th Cir. 1984) (two and one-half year delay justified by belated appearance of key witness, where delay in locating witness was caused by defendant, who wanted immunity that was finally granted eight months before indictment returned). All of these cases established a justifiable and legitimate reason for the preindictment delay. The record in this case, on the contrary, would not meet the standards of any of these cases that the petitioners claim fall within the majority.

Two other cases placed in the majority by petitioners are equally inapposite. In *United States v. Fuesting*, 845 F.2d 664, 669 (7th Cir. 1988), the court began its analysis with an examination of prejudice to the defendant. It found none and its inquiry ended. Under this circumstance, "[t]he government need not present evidence of reason for the delay." *Id.* at 670. Likewise, in *United States v. Jones*, 816 F.2d 1483, 1486, 88 (10th Cir. 1987), no apparent reason existed for the delay. However, the delay in *Jones* did not exceed the statute of limitations applicable to the case. Consequently, no constitutional due process argument arose. *Id.* at 1488 n.2.

The Fourth Circuit decision here is not out of step with the majority of rulings. Certiorari is inappropriate.

In any event, the teachings of *Marion* and *Lovasco* require a case-by-case analysis of the prejudice to a defendant and the government's reasons for the delay. Given the application of *Marion* and *Lovasco* by the Fourth Circuit in this case, it is well within the scope of other cases applying them. Thus, contrary to petitioners' claim, the Fourth Circuit has not applied some minority rule, given the facts of this case. Consequently, it is an inappropriate vehicle for this Court to use to examine this purported split of authority among the circuits.

In summary, the record reveals a conscious, deliberate delay by the government in serving an arrest warrant on respondent. This inaction was intentional and advantaged the prosecution both by causing respondent to loose his crucial, independent alibi witness and by stripping him of an opportunity to demand an expedited trial and to obtain concurrent sentences. In the same way the government was aided by its deliberate actions, respondent was prejudiced. Under these circumstances, consistent with *Marion* and *Lovasco*, a deprivation of respondent's constitutional right to due process of law occurred.

II. THE FOURTH CIRCUIT'S APPLICATION OF MARION AND LAVOSCO DOES NOT CONSTITUTE A NEW RULE REQUIRING CONSIDERATION OF RETROACTIVITY.

Petitioners contend the Fourth Circuit's balancing of the prejudice to respondent caused by the preindictment delay against the government's justifications for the delay creates a new rule because it was not "*dictated* by precedent existing at the time

[respondent's] conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989). This belated assertion of retroactivity[5] is of no moment.

Without belaboring the issue or engaging in unnecessary repetition, it is apparent from the previous argument that the Fourth Circuit's decision did not create a "new rule" within the meaning of *Teague*. Rather, it was a straightforward application of the principles espoused by this Court in *Marion* and *Lavosco*. As *Marion* explained, a resolution of a claim that due process was violated by oppressive preindictment delay "will necessarily involve a delicate judgment based on the circumstances in each case." 404 U.S. at 325. Similarly, *Lovasco* requires that lower courts apply "the settled principles of due process that we have discussed to the particular circumstances of individual cases." 431 U.S. at 797. That is precisely what the Fourth Circuit did in this case. It did not, in anyway, create a new rule. Its actions were plainly dictated by *Marion* and *Lovasco*.

Petitioners seem to suggest that by engaging in a balancing approach, the Fourth Circuit has relieved respondent of some burden of proof. This contention is without merit. First, *Marion* and *Lovasco* do not place upon respondent a burden of proving improper prosecutorial motive for the delay. Rather, they require, through a balancing analysis, a factual determination of the justifications for the delay. The Fourth Circuit analyzed the justifications for the delay and, like the district court before it, found the

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[5] Petitioners concede they failed to raise retroactivity in any court below. This principle is not "jurisdictional" and, therefore, must be relied upon by the government. *Collins v. Youngblood*, ___ U.S. ___, 111 L.Ed.2d 30, 38 (1990). The government does not contend it did not have the opportunity to present this question to the Fourth Circuit. *Teague* was decided before the Fourth Circuit decision in this case, albeit after the case was briefed and argued. Nevertheless, petitioners made no effort to bring *Teague* to the attention of the Fourth Circuit or to suggest the need for a "threshold" consideration of retroactivity through any supplemental memorandum or citation of authority. Furthermore, petitioners had the opportunity to seek a rehearing *en banc* in the Fourth Circuit, but declined to do so. Under these circumstances, petitioners should not now be heard to assert the need for a application of retroactivity principles. *See Hanrahan v. Greer*, 896 F.2d 241, 245 (7th Cir. 1990) (government forfeits retroactivity when it is raised for the first time on appeal).

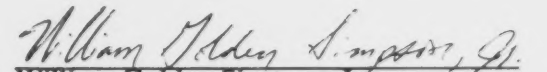
reasons for the delay pale and unavailing. Second, petitioners were not saddled with any burden of proof in this case. Respondent came forward, both in the state court proceedings and in the habeas corpus process, with testimonial and documentary evidence of the government's reasons for the delay and the prejudice he suffered from it. The Fourth Circuit, like the district court before it, did not place any burden on the government. Rather, it simply analyzed all of the record evidence in balancing the obvious prejudice to respondent against the justifications for the twenty-seven month delay. This decision simply did not create a new rule for retroactivity purposes. Given these factual circumstances and the failure of petitioners to timely assert retroactivity, this Court should not grant a Writ of Certiorari to review the decision.

CONCLUSION

For the reasons stated herein, respondent respectfully requests that this Court deny a Writ of Certiorari to review the decision of the Fourth Circuit.

This the 12th day of November, 1990.

Respectfully submitted,



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